IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:05-cv-00329-TCK-SAJ
	)	
TYSON FOODS, INC., et al	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS IN LIGHT OF *NEW MEXICO v. GENERAL ELECTRIC* AND INTEGRATED OPENING BRIEF IN SUPPORT

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Pursuant to Federal Rule of Civil Procedure 12(c), Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc., Simmons Food, Inc., George's, Inc., George's Farms, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., and Willow Brook Foods, Inc. respectfully move this Court to dismiss Plaintiffs' demand for damages under claims 4 and 6 of the First Amended Complaint ("FAC"), Plaintiffs' claim 5 for federal common law nuisance, Plaintiffs' claim 10 for unjust enrichment, restitution or disgorgement, and Plaintiffs' request for punitive and exemplary damages. Dismissal is mandated by the Tenth Circuit's recent decision in *New Mexico v. General Electric*, 467 F.3d 1223 (10th Cir. 2006). In short, Plaintiffs' demands for unrestricted damages, including punitive damages, are preempted or displaced by the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 ("CERCLA") because they conflict with Congress' mandate that all funds recovered for natural resource damages must be used for the restoration or replacement of those natural resources. Moreover, CERCLA's remedial scheme requires that the equitable theories under claim 10 be dismissed.

I. INTRODUCTION

The State of Oklahoma ("Oklahoma" or the "State") filed suit against thirteen poultry integrators (the "Defendants") alleging that the agricultural practices of the independent poultry producers with whom Defendants contract have "caused injury to the [Illinois River Watershed ("IRW")], including the lands, waters and sediments therein." FAC ¶ 1. Oklahoma has asserted, *inter alia*, the following claims:

- Claim 4: a state law nuisance claim brought under theories of public nuisance *per se* pursuant to 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1;
- Claim 5: a nuisance claim brought under federal common law;
- Claim 6: a state law trespass claim; and
- Claim 10: a state law claim based on theories of unjust enrichment, restitution, and disgorgement;

See FAC ¶¶ 98-127, 140-147. Based on these claims, the State seeks the following remedies:

- "[a]ll past monetary damages suffered by and all costs and expenses incurred by the State of Oklahoma," FAC, Part VI, ¶ 1;
- a declaration of liability "for all future monetary damages suffered and all costs and expenses incurred by the State of Oklahoma," *Id.* ¶ 2;
- an injunction "to pay all costs associated with assessing and quantifying the amount of remediation and natural resource damages as well as the amount of natural resource damages itself," *Id.* ¶ 3;
- restitution for "the loss and damages" Oklahoma allegedly suffered, "as well as disgorgement of all gains the Poultry Integrator Defendants realized," *Id.* ¶ 4; and
- "[p]unitive and exemplary damages, to the maximum extent allowable under the law." *Id.* ¶ 5.

This motion does not seek dismissal of claims 1 (CERCLA cost recovery), 2 (CERCLA NRD action), 3 (RCRA citizen suit), or 7-9 (regulatory and statutory causes of action seeking civil penalties and injunctive relief). Pursuant to the Tenth Circuit's decision in *New Mexico*, this motion seeks only to foreclose the award of general monetary damages under non-CERCLA

claims 4 (state law nuisance), 6 (state law trespass), completely to dismiss claims 5 (federal common law nuisance) and 10 (unjust enrichment, restitution and disgorgement), and to bar Plaintiffs' demand for punitive damages on all counts.

In a very similar case, the Tenth Circuit recently held that requests for unrestricted monetary damages for alleged injuries to natural resources held in the public trust are preempted by CERCLA § 107(f)(1). *New Mexico*, 467 F.3d 1223. Such claims conflict with Congress' intent in enacting CERCLA because damages awarded under state law would not be restricted by CERCLA's limitations on how the funds can be spent. The Tenth Circuit clearly and unambiguously held that "CERCLA's comprehensive [natural resource damages] scheme preempts any state remedy designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource." *Id.* at 1247.

Under state law, the damages Oklahoma seeks through these claims carry no legal restrictions on how they must be used and instead will be deposited into the treasury. *See* 62 Okla. Stat. § 7.1.B ("It shall be the duty of each state agency, officer or employee, to deposit in the agency clearing account . . . all monies of every kind, including, but not limited to: . . . Income from . . . judgments . . . received by a state agency, officer or employee by reason of the existence of and/or operation of a state agency"). A damage award could then be used for any purpose, such as paying a lucrative contingency fee to the State's private lawyers. The Tenth Circuit expressly held that such damages conflict with CERCLA. *New Mexico*, 467 F.3d at 1247-48 ("the remedy the State seeks to obtain through [state tort] causes of action – an unrestricted award of money damages – cannot withstand CERCLA's comprehensive NRD scheme"). Thus, the remedies sought by the State in this case are preempted by CERCLA and must be dismissed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

II. LEGAL STANDARD

When the pleadings are closed, a party may move for judgment on the pleadings. Fed. R. Civ. P. 12(c). A court evaluates a judgment on the pleadings identically to a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1160 (10th Cir. 2000). While the Court must accept all well-pleaded factual allegations as true and view them in a light most favorable to the plaintiff, *Realmonte v. Reeves*, 169 F.3d 1280, 1283 (10th Cir. 1999), dismissal is required when it "'appears beyond doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle [him] to relief.'" *Murrell v. Sch. Dist. No. 1,* 186 F.3d 1238, 1244 (10th Cir. 1999) (*quoting Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)). A complaint must also be dismissed on the basis of an affirmative defense—such as preemption—if that defense appears on the face of the complaint or other allowable sources. *See, e.g., Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1158 (10th Cir. 2000) (affirming dismissal under Rule 12(b)(6) on federal preemption grounds); *Nisselson v. Lernout*, ___ F.3d ___, 2006 WL 3216998, at *4 (1st Cir. Nov. 8, 2006); *Leveto v. Lapina*, 258 F.3d 156, 161 (3d Cir. 2001).

III. ARGUMENT

A. *New Mexico* Requires Dismissal Of Oklahoma's Demand For Damages Under Claims 4 And 6 Of The FAC

The Tenth Circuit held that damage claims such as those brought by Oklahoma in the instant suit are preempted by CERCLA. *New Mexico*, 467 F.3d at 1247-48. The state's claims in *New Mexico* and Oklahoma's claims in this case are strikingly similar; indeed, they are virtually identical. In *New Mexico*, the New Mexico Attorney General, with the aid of private attorneys, filed suit as *parens patriae* seeking monetary damages for contaminated groundwater. *Id.* at 1235-36; *New Mexico v. General Electric*, 335 F. Supp. 2d 1185, 1196, 1231 n.95 (D.

N.M. 2004). In this case, Oklahoma seeks monetary damages as *parens patriae*, through a consortium of private attorneys, for allegedly contaminated surface and groundwater in the IRW. *See* FAC at ¶¶ 1, 5. As with this case, New Mexico claimed that the damaged water was an injured natural resource held in trust by the state. *New Mexico*, 335 F. Supp. 2d at 1200. *See* FAC at ¶ 5 (declaring that the allegedly injured natural resources in this case are held in trust by Oklahoma). Again, like this case, New Mexico filed a CERCLA claim along with several state common law and statutory claims, including trespass, public nuisance, and negligence. *New Mexico*, 467 F.3d at 1235-37. *See* FAC at ¶¶ 98-107, 119-27 (asserting state common law and statutory claims under trespass and public nuisance). New Mexico sought $1.2 billion in damages. *New Mexico*, 335 F. Supp. 2d at 1231 n.95. *See* FAC at VI, ¶¶ 1-5 (seeking monetary damages, related past and future costs and expenses, restitution, disgorgement, and punitive and exemplary damages). Like this case, the damages New Mexico sought to recover were not required under state law to be utilized for the rehabilitation of natural resources, but rather were general damages to be "paid into the State's general fund." *Id.* at 1231. *See* 62 Okla. Stat. § 7.1.B (requiring that the Plaintiffs deposit in the State's general fund all "Income from . . . judgments . . . received by a state agency, officer or employee by reason of the existence of and/or operation of a state agency").

The Tenth Circuit held that any state law claims seeking unrestricted damage awards for injuries to natural resources are preempted by CERCLA and its implementing regulations. "[W]e hold CERCLA's comprehensive [natural resource damages ("NRD")] scheme preempts any state remedy designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource." *New Mexico*, 467 F.3d at 1247. Given the similarities between *New Mexico* and Oklahoma's suit here, this Court should

follow the Tenth Circuit's decision and hold that CERCLA's NRD provisions preempt Oklahoma's request for unrestricted damages under its state law claims for nuisance and trespass.

1. Preemption Standard

The Constitution's Supremacy Clause, Art. VI, cl. 2, nullifies state laws that "interfere with, or are contrary to the laws of Congress . . . ." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). Under the precedents of the Supreme Court and the Tenth Circuit, state laws are preempted if (1) Congress explicitly requires preemption; (2) federal legislation is so pervasive as to occupy a regulatory field; (3) state and federal laws conflict to the point of making compliance with both impossible; or (4) if the state law undermines or serves as an obstacle to the full accomplishment of congressional goals. *United States v. City and County of Denver*, 100 F.3d 1509, 1512 (10th Cir. 1996). As the Tenth Circuit stated in *New Mexico*, preemption is not limited to entire claims and their accompanying remedies. Rather, CERCLA preempts a state law claim if "that claim, or any portion thereof, stands as an obstacle to the accomplishment of congressional objectives as encompassed in CERCLA." 467 F.3d at 1244.

2. Unrestricted Damage Awards Conflict with CERCLA's Policy of Preserving Funds For The Repair Or Replacement Of Natural Resources

Unlike the tort claims Oklahoma presses in this case, CERCLA was not designed to compensate injured parties monetarily. "[T]he twin aims of CERCLA are to cleanup hazardous waste sites and impose the costs of such cleanup on parties responsible for the contamination." *Young v. United States*, 394 F.3d 858, 862 (10th Cir. 2005); *see also Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 91 (2d Cir. 2000) (*per curium*) ("CERCLA does not provide compensation to a private party for damages resulting from contamination."). CERCLA is restitutionary in nature in that a defendant must restore or replace what was injured. *Cf. Atlantic*

Richfield Co. v. American Airlines, Inc., 98 F.3d 564, 568 (10th Cir. 1996) ("response costs are ... payments by responsible parties in restitution for cleanup costs.").

CERCLA's natural resource damage ("NRD") scheme allows the trustees of natural resources to sue for the "injury to, destruction of, or loss of natural resources" entrusted to their care. 42 U.S.C. § 9607(f)(1). Importantly, if a trustee's suit prevails, "[s]ums recovered by a State as trustee . . . shall be available for use only to restore, replace, or acquire the equivalent, of such natural resources by the State." *Id.*; *see also Ohio v. Dept. of Interior*, 880 F.2d 432, 444 (D.C. Cir. 1989) ("By mandating the use of all damages to restore the injured resources, Congress underscored in § 107(f)(1) its paramount restorative purpose for imposing damages at all."); 132 Cong. Rec. H9561, H9612-13 (Daily Ed. Oct. 8, 1986) ("The natural resource regime is not intended to compensate public treasuries. Nor are recoveries to be diverted for general purposes."). Accordingly, CERCLA takes the intentions of the trustee and his or her successors and political colleagues out of the picture. Under CERCLA, the plaintiff's measure of damages is carefully circumscribed by what is necessary to "restore, replace, or acquire the equivalent" of the injured natural resources. 42 U.S.C. § 9607(f)(1). The trustee can recover only that amount, and can recover that amount only with the accompanying legal obligation actually to expend the sums recovered only for those purposes.

The process of measuring the injury and then restoring natural resources is heavily regulated by 43 C.F.R. Part 11. *See generally* 43 C.F.R., Part 11 (regulating how a trustee should define, quantify, and value natural resource damages, create a restoration account and design a restoration plan). The Tenth Circuit held that this "comprehensive NRD scheme" established by CERCLA preempts "an unrestricted award of money damages" under state tort law. *New Mexico*, 467 F.3d at 1247-48. After reviewing the text and legislative history of

CERCLA, the Tenth Circuit held that the "*measure* and *use* of damages arising from the release of hazardous waste is restricted to accomplishing CERCLA's essential goals of restoration or replacement . . . ." 467 F.3d at 1245 (italics in original).

The Tenth Circuit held that allowing state trustees to recover unrestricted damage awards under state law creates two prospective obstacles to Congress' goals. First, unrestricted damage awards could potentially frustrate the restoration or replacement of damaged natural resources by allowing the plaintiffs to siphon the money toward other uses. Damages under "state law claims could be used for something other (for example, attorney fees) than to restore or replace the injured resource. The remainder of the NRD recovery . . . would then be insufficient to restore or replace such resource," and work to "undercut Congress's policy objectives in enacting" CERCLA. *New Mexico*, 467 F.3d at 1248-49. Should Oklahoma use a state law damage award for more politically popular purposes, there is no assurance that the IRW's allegedly injured natural resources would ever be restored or replaced for the public's benefit.

Second, the Tenth Circuit noted that unrestricted damage awards open the door for an impermissible double recovery. 467 F.3d at 1248-49 (*citing* 42 U.S.C. § 9607(f)(1) ("There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource.")); *cf. id.* § 9614(b) ("Any person who receives compensation for removal costs or damages or claims pursuant to this chapter shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law."). Should Oklahoma, free from the restrictions of the CERCLA NRD scheme, spend its money on something other than the restoration or replacement of natural resources, Defendants would be subjected to double recovery should EPA one day conclude that the IRW is contaminated with

hazardous waste and order a cleanup. *See New Mexico*, 467 F.3d at 1248 (Defendants "conceivably might be liable for double recovery where a state's successful state law claim for money damages precedes an EPA-ordered cleanup."). Any of these results would clearly conflict with CERCLA's statutory bar against double recovery for the same injuries to natural resources and Congress' goal of achieving appropriate remediation of natural resource injuries.

In *New Mexico*, the state expressly acknowledged that any damage awards received would not be used to restore damaged natural resources. *New Mexico v. General Electric Co.*, 322 F. Supp. 2d 1237, 1259 (D. N.M. 2004). The Tenth Circuit, however, found this acknowledgment to be immaterial in holding that CERCLA preempts state law damage claims. Under *New Mexico*, Defendants do not have to prove that Oklahoma intends to divert a damage award towards other purposes; it is the Plaintiffs' ability to do so that clashes with CERCLA, which expressly prohibits the recovery of damages beyond those necessary for Congress' purposes and which expressly prohibits the expenditure of any award for other purposes. Preemption turns on the intentions of Congress, not the intentions of the plaintiff. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137-38 (1990). Accordingly, this Court should hold, in accordance with the Tenth Circuit's ruling, that Oklahoma's claims for unrestricted monetary damages under state law are preempted.

B. *New Mexico* Requires Dismissal of Oklahoma's Federal Common Law Nuisance Claim

Oklahoma's claim for unrestricted monetary damages and equitable relief under the alleged federal common law of nuisance also must be dismissed as displaced by CERCLA's NRD remedy. Since CERCLA is the federal statute establishing Congress' policies on how state trustees may recover damages to natural resources and how those resources should be restored or

replaced, any federal common law action for injury to natural resources is displaced and must be dismissed in its entirety.

1. Displacement Standard

Oklahoma seeks monetary damages alleging a nuisance under federal common law. FAC ¶¶ 98-108. While Defendants have argued and maintain that there is no federal common law applicable to this area, *see* Tyson Foods, Inc.'s Motion to Dismiss Counts 4-10 of the First Amended Complaint and Integrated Opening Brief In Support (Dkt. 66), at pp. 21-22, even if this cause of action exists, it is displaced by CERCLA's NRD provisions. Even where federal common law is accepted, it is limited to "few and restricted" areas, *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981), and always "subject to the paramount authority of Congress." *Milwaukee v. Illinois*, 451 U.S. 304, 313-14 (1981) (quotation omitted). While preemption arises out of the Supremacy Clause of the Constitution, displacement of federal common law is a separation-of-powers principle where courts yield in matters involving "high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot." *Texas Indus.*, 451 U.S. at 647 (*quoting Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980)). Federal common law claims are displaced in favor of federal statutory requirements when "the scheme established by Congress addresses the problem formerly governed by federal common law." *Milwaukee*, 451 U.S. at 315 n.8. This is not a high standard. In fact, courts need only find that Congress has "spoken to [the] particular issue," *id.* at 313, and approach the analysis with a ready "willingness to find congressional displacement of federal common law." *Id.* at 317.

2. Any Federal Common Law Nuisance Claim For Damages Is Displaced by CERCLA's NRD Scheme

The Tenth Circuit's discussion of "CERCLA's comprehensive NRD scheme," *New Mexico*, 467 F.3d at 1247-48, dispels any notion that Oklahoma may resort to federal common law to recover unrestricted monetary damages or injunctive relief for injury to natural resources. As explained in *New Mexico*, 42 U.S.C. § 9607(f)(1) and its implementing regulations detail what amounts may be recovered for damages to natural resources, by whom, and how recovered damages must be spent (*i.e.*, "only to restore, replace, or acquire the equivalent of such natural resources by the State"). State trustees (and courts in cases brought by state trustees) are guided by EPA regulations defining how natural resource damages are defined, assessed, valued, and remediated. 42 U.S.C. § 9607(f)(2)(C); 42 U.S.C. § 9651(c). Given "CERCLA's carefully crafted NRD scheme" which reflects "Congress' considered judgment as to the best method of serving the public interest in addressing the cleanup of hazardous waste," *New Mexico*, 467 F.3d at 1247, Congress has expressly and clearly "spoken to [the] . . . issue" of suits to remedy injuries to natural resources. By legislating in this area, Congress has filled any void that federal common law could have filled. Accordingly, any federal common law cause of action that could have existed before CERCLA's enactment has been displaced by CERCLA's statutory and regulatory terms.

C. *New Mexico* Requires Dismissal Of Oklahoma's Claim Of Unjust Enrichment, Restitution, And Disgorgement

Oklahoma alleges theories of unjust enrichment, restitution, and disgorgement. FAC ¶¶ 140-147. Under *New Mexico*, this claim must be dismissed in its entirety. While the specific theories of unjust enrichment, restitution, and disgorgement were not addressed in *New Mexico*, the Tenth Circuit's reasoning illustrates that any state law claim seeking recovery under those theories undercuts CERCLA's comprehensive natural resource damage provisions as much as

any tort claim. Additionally, CERCLA's natural resource damage provisions provide an available remedy at law, thereby barring any claim for unjust enrichment, restitution, or disgorgement.

1. CERCLA Preempts State Law Claims Of Unjust Enrichment, Restitution, And Disgorgement For Alleged Natural Resource Damages

Unjust enrichment, restitution, and disgorgement are related equitable remedies. As the Oklahoma courts have recognized, "[t]he unifying theme of [these] various restitutionary tools is the prevention of unjust enrichment . . . restitution rests on the ancient principles of disgorgement . . . Disgorgement is designed to deprive the wrongdoer of all gains flowing from the wrong rather than to compensate the victim of the fraud." *Warren v. Century Bankcorporation, Inc.*, 741 P.2d 846, 852 (Okla. 1987) (emphasis deleted). Restitution was created to "put the parties back into the position in which they were before" or for "the prevention of unjust enrichment." *Id.*; *see also Tull v. United States*, 481 U.S. 412, 424 (1987) ("Restitution is limited to 'restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant.'") (*quoting Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946)).

Congress created CERCLA to restore contaminated properties and natural resources. It is restitutionary in nature, *albeit* subject to restrictions on how recovered funds are used. *Cf. Atlantic Richfield Co.*, 98 F.3d at 568 ("response costs are ... payments by responsible parties in restitution for cleanup costs."). As with the state tort law claims found preempted in *New Mexico*, under an unjust enrichment, restitution, or disgorgement theory Oklahoma would have free reign to spend the recovered money on things other than the restoration or replacement of the allegedly injured natural resources. Oklahoma's attempted circumvention of CERCLA's requirements through a state law restitution claim also raises the potential of a prohibited double

recovery, should EPA eventually be convinced that the natural resource injuries alleged by Oklahoma require EPA-supervised cleanup.

Likewise, claims of unjust enrichment, restitution, and disgorgement focus on a method of measuring damages that conflicts with CERCLA's natural resource damages scheme and have a punitive aspect not recognized by CERCLA. As noted above, CERCLA carefully prescribes how natural resource damages are to be measured. *See* 43 C.F.R., Part 11. This system of measurement takes no account of the Defendants' profits (or lack thereof) but focuses exclusively on the repair or replacement of contaminated natural resources. *See id.* In contrast, unjust enrichment, restitution, and disgorgement are measured by reference to the Defendants' gain and do not follow the damage calculation methodology carefully crafted by Congress and the EPA. Instead, by focusing on a defendant's alleged gains, unjust enrichment, restitution, and disgorgement seek to punish a defendant for wrongfully gained profits. *See Warren*, 741 P.2d at 852 ("In modern legal usage [disgorgement] has frequently been extended to include a dimension of deterrence") (citation omitted); FAC ¶ 147 ("the State of Oklahoma is entitled to disgorgement of all gains the Poultry Integrator Defendants realized in consequence of their wrongdoing.").

By setting the measure of damages as the amount of the Defendants' allegedly ill-gotten gains, the remedies of unjust enrichment, restitution, and disgorgement conflict with CERCLA's mandate that state trustees recover whatever amount is required to replace or restore damaged natural resources (and no more) and introduce a punitive measure of damages not contemplated by CERCLA. *See Warren*, 741 P.2d at 852 (disgorgement "is said to occur when a 'defendant is made to 'cough up' what he got, neither more nor less.") *(quoting* Dobbs, Handbook on the Law of Remedies § 12.1, p. 792 (1973)); Restatement of Restitution § 1, cmt. a ("if the loss differs

from the amount of benefit received, the measure of restitution may be more or less than the loss suffered or more or less than the enrichment").

Were this Court to entertain Oklahoma's claims of unjust enrichment, restitution, and disgorgement, Oklahoma could either be left with too little money effectively to restore the allegedly damaged natural resources or much more money than is required for the job. And whatever the amount of this award might be, the funds would come free of CERCLA's binding legal obligation that the State spend the money only to restore or replace its allegedly damaged natural resources. Claims for unjust enrichment, restitution, and disgorgement thus violate three of Congress' mandates regarding natural resource damages: (1) such damages shall be measured according to a carefully-structured system that focuses exclusively on the natural resources; (2) any resulting damage award must be subject to CERCLA's legal obligation that the money be used solely to replace or restore natural resources; and (3) the state shall not receive a windfall from this process. *New Mexico*, 467 F.3d at 1247 ("The ultimate purpose of any such remedy should be to protect the public interest in a healthy, functioning environment, and not to provide a windfall to the public treasury.") (*quoting Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652, 676 (1st Cir. 1980)) (emphasis deleted). By allowing Oklahoma to change the measure of damages from the cost of restoring natural resources to an unrestricted recovery of the Defendants' allegedly wrongful profits, a common law action for unjust enrichment, restitution, and disgorgement is a clear-cut obstacle to Congress' goals.

2. *New Mexico* Demonstrates That Oklahoma Has A Remedy At Law For Natural Resource Damages, Thereby Barring A Claim For Unjust Enrichment, Restitution, And Disgorgement

Even if Oklahoma's claim for unjust enrichment, restitution, and disgorgement were not preempted by CERCLA's NRD provisions, the existence of CERCLA's extensive remedial scheme provides a remedy at law and, therefore, requires dismissal of claim 10 of the FAC.

Unjust enrichment, restitution, and disgorgement are actions in equity. *Warren*, 741 P.2d at 852. Where a plaintiff may avail itself of a legal remedy, courts will not grant equitable relief. *Billingsley v. North*, 298 P.2d 418, 422 (Okla. 1956) ("one of the general principles of equity of jurisdiction require[s] . . . a showing that no adequate statutory or legal remedy is available."); *Robertson v. Maney*, 166 P.2d 106, 108 (Okla. 1946) ("This court has repeatedly held that where the plaintiff has a plain, speedy and adequate remedy at law equity will not intervene in his behalf") (citing cases); *Robinson v. Southerland*, 123 P.3d 35, 45 (Okla. Civ. App. 2005) ("where the plaintiff has an adequate remedy at law, the court will not ordinarily exercise its equitable jurisdiction to grant relief for unjust enrichment."). Since CERCLA provides a legal remedy for natural resource damages, Oklahoma's claim 10, which is premised solely on theories of unjust enrichment, restitution, and disgorgement, must be dismissed.

D. *New Mexico* Requires That Oklahoma's Demand For Exemplary And Punitive Damages Be Dismissed

Given the Tenth Circuit's holding in *New Mexico*, Plaintiffs' demand for exemplary and punitive damages based on natural resource injuries is particularly inappropriate. If unrestricted compensatory damages frustrate CERCLA's remedial scheme, *a fortiori*, punitive and exemplary awards must be excluded. "[C]ompensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). Punitive damages are in no way linked to the restoration or replacement of injured natural resources, but "are aimed at deterrence and retribution." *Id.*

As with Oklahoma's other requested forms of monetary relief, the award of punitive damages is a "state remedy designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource," and is thus

preempted. *New Mexico*, 467 F.3d at 1247. CERCLA is a strict liability scheme that has an exclusive remedial system for addressing injury to natural resources. *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1078 n.18 (9th Cir. 2006). Under CERCLA, punitive damages are authorized only in very limited circumstances which are not present in this case and which are specifically designed to accomplish the goal of compliance with the EPA's cleanup decisions. *See* 42 U.S.C. 9607(c)(3) (allowing punitive damages, capped at three times cleanup costs, where a potentially responsible party refuses to adhere to an EPA order issued under 42 U.S.C. §§ 9604 or 9606 without "sufficient cause").

In seeking a remedy for the purpose of punishment and retribution, Plaintiff has gone beyond the remedies permitted by CERCLA's comprehensive scheme. *See New Mexico*, 467 F.3d at 1247. Like unrestricted compensatory damage awards, an award of punitive damages would undermine the congressional mandate that "the ultimate purpose" of a remedy for injury to natural resources "should be to protect the public interest in a healthy, functioning environment, and not to provide a windfall to the public treasury." *New Mexico*, 467 F.3d at 1247 (*quoting Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652, 676 (1st Cir. 1980)) (emphasis deleted). As a strict liability statute, Congress did not design CERCLA either to punish those that allegedly damage natural resources or to pay for plaintiffs' lawyers. Oklahoma's attempt to use state tort claims for natural resource damages as a vehicle for these purposes requires that their request for punitive damages is preempted as undermining the congressional goals behind CERCLA.

Finally, even if CERCLA did not directly preempt Plaintiffs' claim for punitive damages, the *New Mexico* court's holding that CERCLA preempts state law claims for compensatory damages in this context nevertheless bars Oklahoma's attempt to recover punitive damages.

Plaintiffs' FAC claims entitlement to punitive damages only under theories of trespass and state and federal nuisance. *See* FAC ¶¶ 107, 118, 126. However, where, as here, the operation of a federal statute extinguishes a plaintiff's right under state law to seek compensatory damages, any contingent state right to recover punitive damages is also extinguished. *See Virgilio v. City of New York*, 407 F.3d 105, 117-18 (2d Cir. 2005); *Aubertin v. Bd. of County Comm'rs*, 588 F.2d 781, 786 (10th Cir. 1978) (punitive damages cannot be recovered where there is no award of compensatory damages); *Kerr-Selgas v. American Airlines, Inc.*, 69 F.3d 1205, 1214 (1st Cir. 1995) ("generally a claimant may not recover punitive damages without establishing liability for either compensatory or nominal damages"). Accordingly, even if the reasoning of *New Mexico* did not require the preemption of Oklahoma's punitive damage claims, CERCLA's preemption of Oklahoma's claims for compensatory damages requires that the State's request for punitive damages be dismissed.

IV. CONCLUSION

For the foregoing reasons, the Court should dismiss: (1) Oklahoma's request for unrestricted monetary damages under claims four, five, six, and ten; (2) claims five and ten in their entirety; and (3) Oklahoma's demand for punitive and exemplary damages.

Dated: December 14, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December, 2006, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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and I further certify that a true and correct copy of the above and foregoing will be mailed via regular mail through the United States Postal Service, postage properly paid, on the following who are not registered participants of the ECF System:

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/s/ Stephen L. Jantzen
STEPHEN L. JANTZEN